IN THE SUPREME COURT
OF THE STATE OF FLORIDA
CASE NO. 75,026

JILL BRIXIUS and ROBERT A. BRIXIUS, her spouse,

Petitioners,

vs.

ALLSTATE INSURANCE COMPANY, a foreign corporation,

Respondent.

ON PETITION TO REVIEW THE DECISION OF THE FLORIDA SECOND DISTRICT COURT OF APPEAL

BRIEF OF AMICUS CURIAE OF THE FLORIDA ASSOCIATION FOR INSURANCE REVIEW SUPPORTING POSITION OF RESPONDENT ALLSTATE INSURANCE COMPANY

Bonita L. Kneeland, Esquire
Florida Bar No. 607355
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL & BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601-1438
(813) 228-7411

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STATEMENT OF THE CASE AND FACTS

Amicus Curiae, Florida Association for Insurance Review adopts the statement of the case and facts submitted by the Respondent, Allstate Insurance Company. For ease of reference by this Court, this Amicus further sets out the following provisions from the Allstate insurance policy issued to Petitioner, Jill Brixius:

Part I, Automatic Liability Insurance

Exclusion - What is not covered.

This coverage does not apply to liability for:

(6) bodily injury to you or any resident of your household related to you by blood, marriage, or adoption.

(R.67 and 75).

Part IV, Uninsured Motorist Insurance

An insured auto is a motor vehicle:

(1) Described on the declarations page, and the motor vehicle you replace it with.

(2) You acquire ownership of during the policy period. . . [further qualification omitted]

An uninsured auto is:

(1) A motor vehicle which has no bodily injury liability bond or insurance policy in effect at the time of the accident.

An uninsured auto is not:

A vehicle defined as an insured auto under the liability portion of this policy.

(R.77-78).

The auto involved in the accident comported with the definition of an insured auto under the liability portion of the policy. (R.66-reverse side).

ISSUE ON APPEAL

AN INSURED FAMILY AUTOMOBILE CANNOT BE AN INSURED VEHICLE WHERE THERE IS ONLY ONE POLICY INVOLVED AND IT EXCLUDES BY DEFINITION AN INSURED VEHICLE FROM ALSO BEING AN UNINSURED VEHICLE UNDER THE POLICY.

SUMMARY OF THE ARGUMENT

This Court has previously held that the policy definition which excludes an insured vehicle under the policy from also being an uninsured vehicle under the policy is a valid restriction on coverage and should be upheld. Specifically, this Court has ruled that the exclusion does not conflict with Florida statutory law on uninsured motor vehicle coverage. Furthermore, this Court has held that the restriction is not void as against public policy and that holding otherwise could, in some policies, defeat a valid family exclusion.

The Petitioner and her Amicus argue that the only occasion when the family exclusion is a "valid" restriction that should not be subverted is when a household relative is driving because its "only" purpose is to prevent collusion. This Court has determined that, in addition to preventing collusive lawsuits between relatives, another policy reason for such a clause is based on the carrier's entitlement to establish lower premium rates by expressly excluding from coverage those who are most likely to be passengers in the automobile. The named insureds of a vehicle are certainly most likely to be occupants of that vehicle.

Petitioner and her Amicus futily rely on case law which has misinterpreted this Court's pronouncements. This Court has only made an exception to the proposition that a vehicle may not be both insured and uninsured under the same policy when two or more separate policies are involved. The facts of this case involve only one policy, making such an exception inapplicable.

ARGUMENT

ISSUE I

AN INSURED FAMILY AUTOMOBILE CANNOT BE AN INSURED VEHICLE WHERE THERE IS ONLY ONE POLICY INVOLVED AND IT EXCLUDES BY DEFINITION AN INSURED VEHICLE FROM ALSO BEING AN UNINSURED VEHICLE UNDER THE POLICY.

A motor vehicle cannot be both an insured and uninsured vehicle under the same policy when that policy specifically provides that a vehicle insured under the policy is not an uninsured vehicle. This is a definitional restriction which this Court has recognized as valid and not in conflict with the State of Florida's statute regulating uninsured and underinsured motor vehicle coverage, pursuant to section 627.727 Florida Statutes. Reid v. State Farm Fire and Casualty Company, 352 So.2d 1172, 1174 (Fla. 1977). This conclusion is all the more necessary when the policy contains an exclusion for liability coverage for a named insured's own injuries, an exclusion which has also been recognized as valid by this Court and which would be subverted by a contrary ruling. Id.

Amicus Curiae, Florida Association for Insurance Review, submits that the argument set forth by the Petitioner and her amicus, the Florida Academy of Trial Lawyers, are predicated on four erroneous propositions which are either unsupported per se by any citations to authority or otherwise fail to hold up under close scrutiny of case law which they do cite. Briefly, these four "fallacies" in their arguments are as follows:

(A) FALLACY ONE: That the definition of an "uninsured motor vehicle" under the policy as one which is not insured for liability under the policy violates the purpose of 627.727 Florida Statutes, the uninsured motor vehicle statute.

(B) FALLACY TWO: That the liability exclusion for bodily injuries to the named insured and related members of the named insured's household may be nullified by an alternate UM claim in cases where the negligent driver is not a family member.

(C) FALLACY THREE: That the two-prong test for determining UM coverage set out by this Court in Allstate Insurance Company v. Boynton, 486 So.2d 552 (Fla. 1986) is also applicable in cases involving only one policy, as is the case at hand.

(D) FALLACY FOUR: That the instant case and the decision in Jernigan v. Progressive American Insurance Company, 501 So.2d 748 (Fla. 5th DCA 1987) are directly on point.

A. This Court in Reid v. State Farm Fire and Casualty Company, 352 So.2d 1172 found more than one reason for upholding a definitional restriction of an uninsured vehicle which is identical to the one in the Allstate policy. This Court specifically found that an exclusion in an uninsured motorist provision of a policy which states that an uninsured motor vehicle may not be the vehicle defined in the policy as the insured motor vehicle, is in compliance with Section 627.727 Florida Statutes, the statute governing coverage on uninsured and underinsured motor vehicles. In Reid, this Court stated:

> We hold that the family car in this case is not an uninsured motor vehicle. It is insured and it does not become uninsured because liability coverage may not be available to a particular individual . . . We recognize as a general rule, that an insurer may not limit the application of uninsured motorist protection . . . We believe, however, that the present case is factually distinguishable from previous cases and is an exception to the general rule. Here the family car, which is defined in the policy as the insured motor vehicle, is the same vehicle which appellant, under the uninsured motorist provision of the policy, claims to be an uninsured motor vehicle. We find no merit in appellant's argument that this exclusion conflicts with Section 627.727 Florida Statute, (1975). (citations omitted, emphasis added).

Thus, this Court found the definitional exclusion valid on its face as in conformity with statutory uninsured motor vehicle law. The Reid case also makes clear that one looks to the vehicle, not the driver, in determining what is insured or uninsured, even though uninsured motor vehicle and uninsured motorist is often used interchangeably. Section 627.727 requires only that insurers offering liability insurance also offer insurance for the protection of persons "who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom." Therefore, the Petitioner's boyfriend may have been an uninsured motorist, but his status need not and does not transform her vehicle into an "uninsured motor vehicle."

Since Reid, several Supreme Courts in sister states have examined the identical definitional restriction and have found the exclusion to be valid and reasonable. See e.g., Aitkin v. State Farm Mutual Automobile Insurance Co., 404 So.2d 1040 (Miss. 1981); Hall v. State Farm Mutual Automobile Insurance Co., 514 So.2d 853

(Ala. 1987). In fact, the Hall case specifically applauds the reasoning in Reid.

B. In Reid, this Court found several additional reasons for honoring the definitional restriction: that it was not void as against public policy and that holding otherwise would defeat a valid family exclusion. As in the present case, the policy in Reid specifically excluded coverage for liability for "bodily injury to you," the named insured, as well as family members. Although it is true that the Reid case involved injuries to an insured passenger caused by a sister with whom she lived, the liability exclusion in Reid, as in this case, focused on who could recover for injuries, not on who happened to be driving:

> State Farm denied liability relying upon a provision in the policy that the insurance does not apply to bodily injury to any insured or any member of the family of an insured residing in the same household as the insured . . . If the exclusion is valid, it applies.

Reid at 1173.

The liability exclusion for bodily injury to a named insured is no less "valid" simply because the driver in this case was not related to the injured named insured, but was instead her boyfriend. The Petitioner's and her amicus' argument to the contrary rests on the shaky proposition that the only purpose of the family exclusion is to prevent collusive lawsuits between relatives. They claim that since no relative was driving, in this case, there was no danger of collusion and the UM restriction, if held invalid, would no longer "defeat" a valid liability exclusion.

First, it is too obvious to even argue the point that the danger of collusion between close friends is as much a danger as collusion between relatives. Furthermore, any distinction between injuries caused by a relative and those caused by friend, as it pertains to the validity of the family exclusion, has been held invalid by numerous Florida appellate courts, most recently by the court in Allstate Insurance Company v. Baker, 543 So.2d 847 (Fla. 4th DCA 1989). See also Porr v. State Farm Mutual Automobile Insurance Company, 452 So.2d 93 (Fla. 1st DCA 1984), rev. denied, 496 So.2d 816 (Fla. 1986); Curtin v. State Farm Mutual Automobile Insurance Company, 449 So.2d 293 (Fla. 5th DCA 1984), rev. denied, 496 So.2d 815 (Fla. 1986); Gibson v. State Farm Mutual Automobile Insurance Company, 378 So.2d 875 (Fla. 2d DCA 1979); Newman v. National Indemnity Company, 245 So.2d 118 (Fla. 3d DCA 1971).

Secondly, although this Court in Reid points out that "[t]he reason for the exclusion is obvious: to protect the insurer from overfriendly or collusive lawsuits between family members," this Court did not state that this reason was the only reason why it chose to recognize the exclusion. In fact, this Court also found that the exclusion was valid because it did not violate the Florida No-Fault laws. Reid, at 1173. Furthermore, as stated earlier, this Court found the UM restriction to be valid in and of itself, apart from the liability exclusion, because it did not violate the UM statute, nor did it violate public policy. Id. at 1174. Only secondarily did this Court reason that by upholding the restriction, the liability exclusion would also continue to be

preserved. At no time in Reid did this Court question the validity of the specific portion of the family exclusion referring to injuries to the named insured.

It is important to understand that this Court has recognized another additional valid purpose for the liability exclusion, beyond threat of collusive suits. In Florida Farm Bureau Insurance Company v. Government Employees Insurance Company, 387 So.2d 932 (Fla. 1980), this Court stated that it continued to hold this exclusion valid "absent statutory prohibition." Id. at 934. Expanding on the purpose for this exclusion clause beyond that which was noted in Reid, this Court held:

> We reject the contention that these clauses are void as against public policy. In addition to the policy reasons for such clauses stated in Reid, we also note that insurance premiums may be established in part by reference to potential exposure to liability by insurance companies and may be lower where those most likely to be passengers in the automobile are expressly excluded from coverage. (emphasis added).

Id. Obviously, in light of this Court's ruling above and in the absence of legislative changes, the family exclusion must be held valid in its entirety, including that portion referring to injuries to the named insured under the policy, regardless of whether or not the driver of the vehicle is a family member. See also, Amica Mutual Insurance Company v. Wells, 507 So.2d 750 (Fla. 5th DCA 1987). It is only logical that named insureds are most likely to be drivers or occupants of the family car.

C. The two-prong test for determining UM coverage, as set out in Allstate Insurance Company v. Boynton, 486 So.2d 552 (Fla.

1986), is applicable solely in cases involving more than one policy. Boynton does not involve a case in which a plaintiff is injured in or by his own vehicle. Therefore, Boynton is obviously distinguishable in that the vehicle which caused the injury was not an insured vehicle under the claimant's own policy. Thus, as to the claimant's policy, the vehicle was not both an insured and uninsured vehicle under the same policy. This Court in Boynton makes this point crystal clear in a footnote where it distinguishes the Reid opinion:

> In Reid we held that a vehicle cannot be both an insured and uninsured vehicle under the same policy. The present case is distinguishable because it involves separate policies. Reid is inapplicable.

Id. at 555 n.5. See also, Simon v. Allstate Insurance Company, 496 So.2d 878 (Fla. 4th DCA 1986) (following the reasoning set out in Boynton at 555 n.5 and distinguishing it from the case at bar which involved only one policy providing both liability and uninsured motorist coverage); Barlow v. Auto-Owners Insurance Company, 358 So.2d 1128 (Fla. 4th DCA 1978).

The court in Jernigan v. Progressive American Insurance Company, 501 So.2d 748 (Fla. 5th DCA 1987) completely misunderstood this Court's reasoning in Boynton. In fact, the Jernigan court either overlooked or chose to ignore the important footnote in the Reid holding. Incredibly, the Jernigan court held that "[t]he definition of uninsured motor vehicle in the present policy is contrary to the Boynton test," and invalidated the definition of uninsured motor vehicle in the policy as "invalid as contrary to the public policy expressed in Section 627.727 Florida Statute,

Id. at 751, despite the opposite conclusion in Reid. Because Jernigan misinterprets this Court's holdings in both Reid and Boynton, it should be overruled.

D. Even if it had been correctly decided, the Jernigan decision and the instant case are completely distinguishable. The Jernigan court notes that "the policy [did not] exclude liability coverage for injuries caused by friends of the insured." For this reason, the court ruled that "declaring the uninsured motorist exclusion invalid does not defeat any valid liability exclusion." Id. at 751. Unlike the policy in the Jernigan case, the Allstate policy does contain an exclusion for liability coverage for any bodily injury to the named insured. It does not matter who caused the bodily injury, a relative or a friend. Thus, the Jernigan case is factually distinguishable and need not be considered in this case.

The court in Allstate Insurance Company v. Baker, 543 So.2d 847 (Fla. 4th DCA 1989) also reached the conclusion that Jernigan was distinguishable, noting that in Jernigan there was no liability exclusion similar to the family exclusion which barred recovery. Id. at 850. The Baker court found that the Allstate policy contained a valid household liability exclusion which could not be subverted by an attempt to recover for damages under the UM provisions of the policy. Id. As stated by the National Association of Independent Insurers in their amicus brief at page 7, footnote 1, the Allstate policy in the Baker case contained the

exact household exclusion language as the policy in the case at hand; that is, it excluded coverage for injuries to the named insured as well as any resident relative. In sum, the Jernigan case is totally inapplicable to the case at hand.

Because the Petitioner's and Amicus' four arguments are not supported by concrete, on-point caselaw, the decision of the Second District should be affirmed and the Jernigan case distinguished or overruled.

CONCLUSION

For the reasons stated in this amicus brief, the Florida Association for Insurance Review respectfully requests this Court to affirm the decisions of the Second District Court of Appeal in all respects, both in this case and in its companion case of Sharon v. State Farm Fire & Casualty Company, 15 FLW D191 (Fla. 2d DCA, January 19, 1990).

Respectfully submitted,

Florida Association for
Insurance Reveiew

By: Bonita L. Kneeland

Bonita L. Kneeland, Esquire
Florida Bar No. 607355
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL & BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to David J. Abbey, Esquire and Betsy Repaal, Esquire, Fox & Grove, Chartered, One Fourth Street North, Suite 1000, St. Petersburg, Florida 33701; Norman A. Coll, Esquire and Michael J. Higer, Esquire, 3200 Miami Center, 100 Chopin Plaza, Miami, Florida 33131; Timothy C. McHugh, Esquire, 5401 W. Kennedy Boulevard, Suite 560, Tampa, Florida 33609; and Lisa A. Jayson, Esquire and Steven C. Ruth, Esquire, L. D. Beltz & Associates, Post Office Box 16008, St. Petersburg, Florida 33733 on this 21st day of May, 1990.

Bonita L. Kneeland

Bonita L. Kneeland, Esquire